

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,
378 N. Main Avenue
Tucson, AZ 85701,

Plaintiff,

v.

U.S. FISH AND WILDLIFE SERVICE,
1849 C Street, NW
Washington, DC 20240,

Defendant.

Case No.: _____

COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

1. In this case, the Center for Biological Diversity (“the Center”) challenges the ongoing failure of the U.S. Fish & Wildlife Service (“FWS”) to timely provide requested records in response to a request for records concerning the U.S.-Mexico border wall, in violation of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *as amended*.

2. The Center submitted a FOIA request to FWS on July 18, 2017, seeking records related to the proposed U.S.-Mexico border wall, including any and all records from January 19, 2017 to the date of the agency’s search, that reference a border wall, fence, levees, and/or barriers—including but not limited to records of meeting notes, presentations, maps, and/or inter-agency and intra-agency correspondence.

3. Records responsive to this FOIA request will provide the Center and the public with crucial insight into government activities, as the requested records are expected to reveal currently secretive plans for building and/or reconstructing barriers along the U.S.-Mexico border in National Wildlife Refuges. Specifically, the requested records will contribute to public understanding of how the proposed U.S.-Mexico border wall construction will affect the integrity

of National Wildlife Refuges and if FWS's actions are consistent with federal environmental laws.

4. Although 441 working days have passed since the Center submitted its FOIA request, to date FWS has not provided a determination or any responsive records.

5. Accordingly, the Center brings this action challenging FWS's violations of FOIA resulting from its failure to respond to the Center's FOIA request, and seeks declaratory and injunctive relief to require the search for and production of all responsive records.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

7. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this district, and because the responsive records may be found in this district.

8. Declaratory relief is appropriate under 28 U.S.C. § 2201.

9. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).

PARTIES

10. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 69,500 members. FWS's failure to comply with FOIA impairs the Center's ability to provide full, accurate and current information to the public on a matter of public interest. Absent this information, the Center is hampered in its ability to advance its mission to protect native species

and their habitat. The Center and its members are harmed by FWS's violations of FOIA, which are preventing the Center from gaining a full understanding of FWS's activities, priorities, and decision-making regarding the proposed U.S.-Mexico border wall—particularly with respect to National Wildlife Refuges.

11. Defendant U.S. FISH AND WILDLIFE SERVICE is a federal conservation agency within the U.S. Department of the Interior. FWS is responsible for conserving, protecting, and enhancing fish, wildlife, and their habitats for the continuing benefit of the American people. FWS is in possession and control of the records that the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f) and is responsible for fulfilling the Center's FOIA request to it.

STATUTORY BACKGROUND

12. FOIA's basic purpose is to promote government transparency.

13. FOIA requires federal agencies to release requested records to the public unless one or more specific statutory exemptions applies. 5 U.S.C. § 552(b)(1)-(9).

14. Within 20 working days of receiving a FOIA request, an agency must determine if it will release requested records and notify the requester of its determination and the reasons therefore, the right to seek assistance from the FOIA Public Liaison, and the right to appeal an adverse agency determination. *Id.* § 552(a)(6)(A)(i).

15. Only in "unusual circumstances" may an agency extend the time to make a final determination by no more than 10 additional working days, but it must provide written notice to the requester setting forth the unusual circumstances for the extension and "the date on which a determination is expected to be dispatched." *Id.* § 552(a)(6)(B)(i). If the agency provides written notice that the request cannot be processed within the specified time limit, the agency

shall provide “an opportunity to limit the scope of the request so that it may be processed within” the statutory time limit or “an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request” and shall make available its FOIA Public Liaison to “assist in the resolution of any disputes between the requester and the agency.” *Id.* § 552(a)(6)(B)(ii).

16. FOIA requires each agency to make reasonable efforts to search for records in a manner reasonably calculated to locate all records responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D). Using the date of a FOIA request as the cut-off date for its search is not always reasonable, while using the date that the agency commences its search has consistently been found to be a reasonable.

17. FOIA requires federal agencies to promptly disclose requested records. *Id.* § 552(a)(3)(A), (a)(6)(C)(i).

18. In certain limited instances, records may be withheld pursuant to nine specific exemptions. *Id.* § 552(b). These exemptions must be narrowly construed in light of FOIA’s dominant objective of disclosure, not secrecy.

19. FOIA places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

20. FOIA provides this Court jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.”

21. Alternatively, an agency’s response to a FOIA request is subject to judicial review under the APA, which confers a right of judicial review on any person who is adversely affected by agency action, 5 U.S.C. § 702, and authorizes district courts to compel agency action that is

unlawfully withheld or unreasonably delayed. *Id.* § 706(1). District courts must set aside any agency action that is found to be “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.* § 706(2)(A).

FACTUAL BACKGROUND

22. On July 18, 2017, the Center sent via electronic mail a FOIA request to FWS. The Center requested “all records mentioning, including, and/or referencing a border wall, fence, levees, and/or barriers, including but not limited to meeting notes, presentations, maps, and/or inter-agency and intra-agency correspondence from January 19, 2017 to the date of this search.”

23. On July 25, 2017, FWS sent an email to the Center acknowledging receipt of the FOIA request. In the email, FWS assigned the Center’s FOIA request tracking number (FWS-2017-01049) and informed the Center that the agency’s response “will be coordinated by our HQ’s FOIA office.”

24. After 23 working days had passed without receiving any responsive records from FWS, on August 18, 2017, the Center sent a letter notifying FWS that it had violated FOIA’s statutory deadline and requesting that FWS provide an estimated date of completion for a determination on the Center’s FOIA request.

25. As of the date of this filing, FWS has not responded to the Center’s August 18, 2017 notice of deadline violation letter.

26. As of the date of this filing, which is 421 working days after the 20 working day determination deadline of August 15, 2017, the Center has received no records and no additional communications from FWS regarding the Center’s July 18, 2017 FOIA request.

27. Upon information and belief, FWS has failed to conduct a search for responsive records to the Center’s July 18, 2017 FOIA request.

28. In connection with the Center's FOIA request, FWS has not requested additional information from the Center or notified the Center of any "unusual circumstances" that prevent it from complying with FOIA's deadline for a determination. *Id.* § 522(a)(6)(A)-(B).

29. FWS's failure to conduct an adequate search for responsive records and failure to provide all responsive records to the Center undermine FOIA's primary purpose of transparency and openness in government.

30. The Center has been required to expend resources to prosecute this action.

FIRST CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

(failure to make a timely determination on the Center's FOIA request)

31. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

32. The Center has a statutory right to a lawful final determination from FWS on its FOIA request, in a manner that complies with FOIA.

33. FWS violated FOIA the Center's rights in this regard by unlawfully delaying its response beyond the deadline that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

34. The Center's organizational activities will be adversely affected if FWS is allowed to continue violating FOIA's determination deadlines as it has in this case.

35. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, FWS will continue to violate the Center's rights to receive public records under FOIA.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

(failure to adequately search for records responsive to the Center's FOIA request)

36. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

37. The Center has a statutory right to have FWS process its FOIA requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). FWS is violating the Center's rights in this regard by unlawfully failing to undertake a search reasonably calculated to locate all records that are responsive to the Center's FOIA request.

38. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to FWS in the foreseeable future. *Id.*

39. The Center's organizational activities will be adversely affected if FWS continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records that are responsive to the Center's FOIA requests.

40. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, FWS will continue to violate the Center's rights to receive public records under FOIA.

THIRD CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

(failure to promptly disclose the records responsive to the Center's FOIA request)

41. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

42. FWS is violating FOIA and implementing regulations by refusing to disclose the records responsive to the Center's FOIA Request.

43. The Center has a statutory right to the records it seeks.

44. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to FWS in the foreseeable future.

45. The Center's organizational activities will be adversely affected if FWS continue to violate FOIA's disclosure provisions as it has in this case.

46. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendants will continue to violate Plaintiff's rights to receive public records under FOIA.

FOURTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

(failure to disclose all non-exempt records responsive to the Center's FOIA Request)

47. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

48. The Center has a statutory right to the records it seeks, and there is no legal basis for FWS to assert that any of FOIA's nine exemptions to mandatory disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-(9).

49. To the extent FWS is invoking any of these exemptions, FWS is unlawfully withholding from disclosure records that are responsive to the Center's FOIA request.

50. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to Defendants in the foreseeable future.

51. The Center's organizational activities will be adversely affected if FWS continues to violate FOIA's disclosure provisions.

52. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, FWS will continue to violate the Center's rights to receive public records under FOIA.

FIFTH CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

(failure to provide reasonably segregable portions of any lawfully exempt records)

53. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

54. The Center has a statutory right to any reasonably segregable portion of a record that may contain information lawfully subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

55. FWS is violating the Center's rights in this regard to the extent they are unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to the Center's FOIA request.

56. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to FWS in the foreseeable future.

57. The Center's organizational activities will be adversely affected if FWS is allowed to continue violating FOIA's disclosure provisions as it has in this case.

58. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, FWS will continue to violate the Center's rights to receive public records under FOIA.

SIXTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First through Fifth Claim)

(agency action unlawfully withheld or unreasonably delayed)

59. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

60. FWS is unlawfully withholding agency action by failing to comply with the mandates of FOIA as a result of its failure and refusal to search for and disclose records responsive to the Center's FOIA request. FWS's failures constitute agency actions that are unlawfully withheld pursuant to the APA, 5 U.S.C. § 706(1).

61. Alternatively, FWS is unreasonably delaying agency action by failing to comply with the mandates of FOIA as a result of its failure and refusal to search for and disclose records responsive to the Center's FOIA request. FWS's failures constitute agency action unreasonably delayed pursuant to the APA, 5 U.S.C. § 706(1).

62. As alleged above, FWS's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of its statutory duties under the APA.

63. The Center has suffered a legal wrong as a result of FWS's failure to comply with the mandates of FOIA. As alleged above, FWS is violating its statutory duties under the APA and injuring the Center's interests in public oversight of governmental operations.

64. The Center has no other adequate remedy at law to redress the violations noted above.

65. Plaintiff is entitled to judicial review under the APA, 5 U.S.C. § 702.

SEVENTH CLAIM FOR RELIEF
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(In the Alternative to the First Through Sixth Claims)

(arbitrary and capricious agency action)

66. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

67. FWS is violating FOIA's statutory mandates by failing to search for and disclose records responsive to the Center's FOIA request. By violating FOIA's statutory mandates, FWS's actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the law pursuant to the APA, 5 U.S.C. § 706(2)(A).

68. As alleged above, FWS's failure to comply with the mandates of FOIA has injured the Center's interests in public oversight of governmental operations and is in violation of the agency's statutory duties under the APA.

69. The Center has suffered a legal wrong as a result of FWS's failure to comply with the mandates of FOIA. As alleged above, FWS is violating its statutory duties under the APA and injuring the Center's interests in public oversight of governmental operations.

70. The Center has no other adequate remedy at law to redress the violations noted above.

71. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendant to conduct searches reasonably calculated to locate all records responsive to the Center's FOIA request, utilizing a cut-off date for such searches that is the date

the searches are conducted, and provide the Center, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.

2. Declare that Defendant's failures to timely undertake a search for and disclose to Plaintiff all records responsive to Plaintiff's FOIA request, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i), or in the alternative, are agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or are arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2).

3. Declare that Defendant's failure to timely make a determination on Plaintiff's FOIA request is unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i) and (ii), or in the alternative, is agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or is arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2)(A).

4. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

5. Grant such other and further relief as the Court may deem just and proper.

DATED: April 23, 2019

Respectfully submitted,

/s/ Anchun Jean Su

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